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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. HARVEY MACK LEONARD, Defendant and Appellant.	C059936 (Super. Ct. No. SCV-18150)

A jury found that defendant Harvey Mack Leonard is a sexually violent predator (SVP) and the trial court committed him to an indeterminate term with the Department of Mental Health. (Welf. & Inst. Code, §§ 6600 et seq. [the SVP Act], 6600, subd. (a)(1), 6604.)[1]

On appeal, defendant contends that there was insufficient evidence showing he was likely to engage in sexually violent criminal behavior if released, and that the SVP Act, as amended in 2006, is unconstitutional on due process, ex post facto and equal protection grounds.

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

A recent decision from our state Supreme Court, *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*), considered these three constitutional claims and found "some merit" in the equal protection claim. (*Id.* at p. 1196.) *McKee* remanded the case before it to the trial court there to determine whether the People could demonstrate the constitutional justification for imposing on SVP's a greater burden to obtain release from commitment than that imposed on those civilly committed under similarly situated commitment schemes--i.e., mentally disordered offenders and those not guilty by reason of insanity. Under *McKee*, we must remand to the trial court here to determine the issue of this equal protection justification; in all other respects, we shall affirm the order of commitment. We will set forth the facts in our discussion of the issues.

DISCUSSION

I. The Evidence Was Sufficient

Under the 2006-amended SVP Act, "'Sexually violent predator' means a person [(1)] who has been convicted of a sexually violent offense against one or more victims and [(2)] who has a diagnosed mental disorder that [(3)] makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

On appeal, defendant challenges the sufficiency of the evidence as to the third element. The standard "likely" in element (3) means "a substantial danger, that is, a serious and

well-founded risk." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 922 (*Ghilotti*), italics omitted [construing similar "likely" language in § 6601, subd. (d)].)

In reviewing the sufficiency of the evidence, we must review the entire record in the light most favorable to the judgment to determine whether substantial evidence--i.e., evidence that is reasonable, credible and of solid value--supports the determination in the trial court. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 465-466.)

The prosecution presented three witnesses: defendant himself and Drs. Christopher North and John Hupka. The defense presented two: Drs. Denise Kellaher and Brian Abbott.

A. Prosecution Evidence

Defendant

Defendant was a serial rapist between 1976 and 1985, with at least eight victims.

Defendant denied having a mental disorder, and therefore believes that any treatment would be a sham. He has never successfully completed a sex offender treatment program. He attributed his past sexually violent behavior to youth, stupidity, and a wild disposition. Defendant was born January 1, 1950, and was 58 years old at the time of trial.

Dr. Christopher North

Dr. North, a psychologist, evaluated defendant in 2005 and diagnosed him with coercive paraphilia (not otherwise specified), antisocial personality disorder, and alcohol abuse.

(Paraphilia encompasses recurring and intense sexually arousing fantasies or behavior involving suffering of self or others.)

At trial, it was stipulated that Dr. North had updated his diagnosis, by stating: "In retrospect, I do not think [defendant] has a coercive paraphilia, but I do think he meets [the SVP] criteria based on his ASPD [antisocial personality disorder], and that this disorder does predispose him to commit sexually violent offenses. This [is] the first time that I ever recommended civil commitment for someone based on ASPD alone."

Dr. North found defendant unamenable to treatment, noting that defendant had resisted treatment and mocked those who did participate.

On tests assessing the likelihood for committing a new sex crime, defendant scored in the "high risk" range on a "Rapid Risk Assessment for Sexual Offense Recidivism" (RRASOR) test in 1999 and on a "Static-99" test in 2000 (with a score of 7 on the Static-99 test, as calculated by Dr. North; 6 or above indicating "high risk").

While sex crimes typically decline with age, especially after 60, the more important factors include health, vigor and vitality. Defendant, 58 years old, appeared quite healthy and vigorous given his exercise routine (walking several miles per day), an assault he recently committed (he beat up an elderly patient in February 2007), and his possession of a Playboy picture. Moreover, a study based on a Static-99-like test showed that offenders, aged 40 to 59 with two prior sexual

sentencings, like defendant, had a 49 percent recidivism rate. Another study concluded that, for serious offenders, advanced age should not be considered a possible actuarial mitigating factor.

Dr. John Hupka

Dr. Hupka, a psychologist, also evaluated defendant in 2005 and diagnosed him with coercive paraphilia (not otherwise specified) and antisocial personality disorder, and defendant still suffers from both. Dr. Hupka opined that defendant meets the SVP criteria.

Even without the paraphilia diagnosis, Dr. Hupka testified, he would still find defendant likely to engage in sexually violent criminal behavior, given his still severe antisocial personality disorder.

Dr. Hupka scored defendant at a "high risk" 8 on the Static-99 test.

Although studies show that, in general, the risk level of re-offense for sex offenders declines significantly between the ages of 50 and 59, and begins to approach zero for those 60 and above, defendant was not a typical case. Defendant may have been in his late 50's, but there was no evidence of his "slowing down," given his "very hostile" and "potentially threatening" behavior during a recent interview (June 2007) and given his very recent physical assault.

B. Defense Evidence

Dr. Denise Kellaher

Dr. Kellaher, a psychiatrist, diagnosed defendant with antisocial personality disorder, but found no evidence of paraphilia in his prior offenses; rather, he had been an "opportunistic rapist."

Dr. Kellaher opined that defendant's antisocial personality disorder does not predispose him to commit sexually violent predator acts because this disorder diminishes sharply with age, and falls to around zero at around age 60 ("antisocial burnout"), and this has happened with defendant. Defendant also suffers from diabetes, had a quadruple heart bypass in 2003, and was diagnosed with Peyronie's Disease in 2005 (a penis deformity that largely precludes erection).

Dr. Brian Abbott

Dr. Abbott, a psychologist, concluded that defendant does not meet the SVP mental disorder criteria. Defendant suffers from antisocial personality traits that do not rise to antisocial personality disorder, and these traits diminish to very low rates of antisocial behavior in the 50 to 60-plus age range.

Furthermore, a study by the creator of the Static-99 test showed that rapists, aged 50 to 59, reoffend at about a 13.5 percent clip, and at age 60-plus this rate drops to zero.

C. Analysis

Defendant bases his claim of insufficient evidence on two points: (1) it has been 23 years (i.e., since 1985) since he

committed any kind of sexually inappropriate behavior, and (2) the likelihood of recidivism is very low given his nearly 60 years of age.

As for the first point, defendant neglects to mention that he has been confined in prison custody or in civil commitment for nearly all the time--the 23 years--he claims he has been towing the line with respect to his sexual behavior. The 23-year period began after he was convicted again of a forcible sex crime and sentenced to a significant term. While sexually inappropriate behavior certainly can take place behind custodial walls,[2] the critical consideration is whether defendant is likely to engage in sexually violent criminal behavior outside those walls, an environment much more conducive to such behavior. Drs. North and Hupka answered "yes" to this critical question.

As for defendant's second point--his upcoming milestone of maturity, 60 years of age--one can say that, for defendant, it's not so much the age as the mileage. Even though the advance to age 60 is typically a protective factor, Dr. Hupka concluded (and Dr. North concurred), "I don't see it with [defendant]." Both doctors noted defendant's vigor and noted that he had physically assaulted another person in 2007 (an elderly patient). Again, in Dr. Hupka's words: There was no evidence defendant was "slowing down." Defendant had been "very hostile" and "potentially threatening" even during Dr. Hupka's recent

[2] To defendant's credit, there is no evidence of such behavior in prison or in civil commitment.

interview. This atypicality was what made Drs. North and Hupka opine that defendant met the SVP criteria based on his severe antisocial personality disorder alone.

Furthermore, defendant points to studies showing the rate of re-offense for sex offenders age 60 and over is very low or zero. Again, that is the typical case. This is not. A study based on a Static-99-like test showed that offenders, aged 40 to 59 with two prior sexual sentencings, like defendant, had a 49 percent recidivism rate. Also, defendant tallied his Static-99 "high risk" score in 2000, not when he was some kid, but 50 years old. And Dr. Kellaher's defense-supportive testimony that antisocial personality disorder typically falls to zero around age 60 concerning the commission of all crimes, including assault, is undercut by defendant's commission of assault in 2007.

We conclude there was sufficient evidence to show that if defendant is released "it is likely that he . . . will engage in sexually violent criminal behavior" (§ 6600, subd. (a)(1))--that is, "a substantial danger," "a serious and well-founded risk" (*Ghilotti*, *supra*, 27 Cal.4th at p. 922, italics omitted).

II. Constitutional Claims

Defendant contends that the 2006-amended SVP Act, which provides for indeterminate commitment, violated his federal constitutional rights of due process, ex post facto and equal protection. The state Supreme Court's recent decision in *McKee*, *supra*, 47 Cal.4th 1172, answers these contentions.

A. *Due Process*

Defendant contends the amended SVP Act violated his federal constitutional right to due process by providing for an indeterminate commitment.

McKee rejected this contention by noting that an indefinite civil commitment is consistent with due process if the commitment statute provides fair and reasonable procedures so that the person is held only as long as he is both mentally ill and dangerous. (*McKee*, *supra*, 47 Cal.4th at pp. 1188-1191, 1193; see also *Jones v. United States* (1983) 463 U.S. 354, 368 [77 L.Ed.2d 694, 707-708]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 77 [118 L.Ed.2d 437, 446].)

Defendant turns his attention to those procedures. He argues that "[w]hile the new version of the SVP Act does provide mechanisms for judicial review of the indefinite commitment, these mechanisms are inadequate under the due process clause." We disagree.

The amended SVP Act provides two mechanisms for judicial review of defendant's indeterminate commitment.

With respect to the first mechanism--the State Department of Mental Health (the Department) may file a petition for unconditional discharge or conditional release (§ 6605, subd. (b))--defendant argues that the filing of such a petition is in the Department's absolute discretion and thus the state can prevent any hearing from ever being held. We reject defendant's

claim because there is no basis for speculating that the Department will not fairly assess the mental condition of a committed person.

With respect to the second mechanism--the committed person may file a petition for discharge or conditional release (§ 6608)--defendant claims the committed person has no right to an expert, the court is empowered to summarily deny the petition if it believes the petition is frivolous, and the committed person bears the burden of proving that he should be released or is not an SVP. *McKee* rejected each of these three claims: as to experts (*McKee*, *supra*, 47 Cal.4th at pp. 1192-1193 [SVP has right to assistance of expert]); as to summary denial (*id.* at p. 1192 & fn. 6 [frivolous petitions are not entitled to a hearing, and determination of frivolousness may be judicially reviewed]); and as to burden of proof (*id.* at p. 1191 [burden of proof, based on preponderance standard, shifts to SVP only after state initially had burden of proof, based on standard of beyond reasonable doubt, to show SVP's requisite criminal acts and a diagnosed mental disorder making SVP likely to engage in sexually violent criminal behavior]).

For these reasons, defendant's due process claim fails.

B. Ex Post Facto

Defendant contends that the 2006 amendments of the SVP Act by Proposition 83 render the SVP Act punitive in nature in violation of the ex post facto clause. *McKee* rejected this

contention by finding these amendments not punitive in nature. (*McKee*, *supra*, 47 Cal.4th at pp. 1193, 1195.)

Defendant's ex post facto claim fails.

C. Equal Protection

Defendant contends his indeterminate commitment violates his right to equal protection. In his view, SVP's are similarly situated with those determinately committed (1) as mentally disordered offenders (MDO's) and (2) as not guilty by reason of insanity (NGI acquittees) because "[e]ach of these [three] statutory schemes has two common criteria--a finding of a mental disorder, and a showing of dangerousness." *McKee* found "some merit" in this contention and remanded for further proceedings. (*McKee*, *supra*, 47 Cal.4th at p. 1196.)

Relying on *In re Moye* (1978) 22 Cal.3d 457 and *In re Smith* (2008) 42 Cal.4th 1251, *McKee* found that SVP's are similarly situated to MDO's and NGI acquittees for equal protection purposes because all three classes of individuals are involuntarily committed to protect the public from those who are dangerously mentally ill. (*McKee*, *supra*, 47 Cal.4th at pp. 1203, 1207.)

McKee concluded, however, that SVP's "bear a substantially greater burden in obtaining release from commitment" than MDO's and NGI acquittees, and it remanded the matter to the trial court to determine whether the People could demonstrate "the constitutional justification" for this distinction. (*McKee*, *supra*, 47 Cal.4th at pp. 1203, 1208-1209.)

McKee does not explain whether the justification will be a one-time finding, forever applicable to all SVP's committed under the statutory scheme, or whether in every case there must be justification for treating a particular SVP differently from MDO's and NGI acquittees. The opinion appears to contemplate a categorical justification with its citation in footnote 9 to United States Department of Justice studies and the like. (*McKee*, *supra*, 47 Cal.4th at p. 1206, fn. 9.) However, it also suggests in footnote 10 that there may be classes of SVP's that pose a greater risk to particularly vulnerable victims, such as children. (*Id.* at p. 1208, fn. 10.) In any event, until we receive further direction from the state Supreme Court, we remand to the trial court to determine whether sufficient justification has been shown for treating SVP's differently than MDO's and NGI acquittees under the guidance provided in *McKee*.[3]

DISPOSITION

The case is remanded to the trial court to determine whether the People can demonstrate the constitutional justification for imposing on SVP's a greater burden to obtain release from commitment than is imposed on MDO's and NGI

[3] Defendant also claims the amended SVP Act violated his double jeopardy rights. However, defendant has forfeited this claim by failing to separately head it and to provide authority for it. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

acquittees. In all other respects, the order of commitment is affirmed.

BUTZ, J.

We concur:

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.